

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

EVA L. WATTS,

Plaintiff,

vs.

DECISION ONE MORTGAGE COMPANY,
LLC; COUNTRYWIDE HOME LOANS;
SAXON MORTGAGE SERVICES, INC.;
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.,

Defendants.

CASE NO. 09 CV 0043 JM (BLM)

**ORDER GRANTING MOTION TO
DISMISS BY DEFENDANTS
COUNTRYWIDE HOME LOANS,
INC., MORTGAGE ELECTRONIC
REGISTRATION SERVICES, INC.,
and SAXON MORTGAGE
SERVICES, INC.**

Doc. No. 5

On October 9, 2008, Plaintiff Eva L. Watts ("Plaintiff") originally filed a complaint in the Superior Court of the State of California, County of San Diego, raising claims arising out of a mortgage loan transaction. (Doc. No. 1, Exh. A, "Complaint.") The proceeds of the loan were used to purchase Plaintiff's principal dwelling (the "Property"), which is now subject to nonjudicial foreclosure . Following service of the Summons and Complaint, Defendant Countrywide Home Loans, Inc. ("Countrywide") timely removed the action to federal court on January 12, 2009. (Doc. No. 1.) On January 20, 2009, Defendants Countrywide and Mortgage Electronic Registration Systems, Inc. ("MERS") submitted the pending motion to dismiss under Fed.R.Civ.P. ("Rule") 12(b)(6). ("Mot.," Doc. No. 5.) Defendant Saxon Mortgage Services, Inc. ("Saxon" and collectively

1 with Countrywide and MERS, “Defendants”) joined the motion by notice dated January 30, 2009.¹
 2 (Doc. No. 7.) It does not appear Defendant Decision One Mortgage Company (“Decision One”) has
 3 been served in this action.

4 Under the Civil Local Rules, Plaintiff’s response to the motion was due on or before February
 5 6, 2009. See Civ.L.R. 7.1(e)(2). To date, Plaintiff has neither filed an opposition nor sought
 6 additional time to do so. On February 11, 2009, Defendants filed a reply requesting the motion be
 7 granted based on Plaintiff’s non-opposition. (Doc. No. 9.) When an opposing party does not file
 8 papers in the manner required by Civ.L.R. 7.1(d)(2), the court may deem the failure to “constitute a
 9 consent to the granting of a motion or other request for ruling by the court.” Civ.L.R. 7.1(f)(3)(c).
 10 Notwithstanding Plaintiff’s failure to respond, the court reviews the motion on the merits to ensure
 11 dismissal is appropriate. Pursuant to Civ.L.R. 7.1(d), the matter was taken under submission by the
 12 court on February 20, 2009.

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14 **Discussion**

15 According to the Complaint, Decision One offered Plaintiff a home mortgage loan to finance
 16 the purchase of the Property and the loan closed on August 7, 2006. (Compl. at ¶¶ 12, 26.) Plaintiff
 17 later defaulted on the loan, leading to entry of a Notice of Default on September 2, 2008. (Compl. at
 18 ¶ 35.) The present status of any pending or completed sale is unclear from the parties’ submissions.
 19 Plaintiff assert federal causes of action under the Racketeer Influenced and Corrupt Organizations Act,
 20 18 U.S.C. § 1961 *et seq.* (“RICO”), the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* (“TILA”), and
 21 the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.* (“RESPA”). Plaintiff also raises
 22 state law claims to quiet title and for fraud, negligent infliction of emotional distress, negligence,
 23 cancellation based on impossibility, and slander of title. Plaintiff seeks injunctive relief (labeled as
 24 a “first cause of action”), damages, attorneys’ fees and costs, declaration that the loan and Deed of
 25 Trust are null and void, and rescission.

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28 ¹To the extent Countrywide and MERS offer general arguments in their motion to dismiss, such arguments are construed as having been made by Countrywide, MERS, and Saxon.

I. Legal Standards

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the pleadings. De La Cruz v. Tormey, 582 F.2d 45, 48 (9th Cir. 1978). In evaluating the motion, the court must construe the pleadings in the light most favorable to the plaintiff, accepting as true all material allegations in the complaint and any reasonable inferences drawn therefrom. See, e.g., Broam v. Bogan, 320 F.3d 1023, 1028 (9th Cir. 2003). While Rule 12(b)(6) dismissal is proper only in “extraordinary” cases, the complaint’s “factual allegations must be enough to raise a right to relief above the speculative level...” U.S. v. City of Redwood, 640 F.2d 963, 966 (9th Cir. 1981); Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1965 (2007) (allegations must provide “plausible grounds to infer” that plaintiff is entitled to relief). The court should grant 12(b)(6) relief only if the complaint lacks either a “cognizable legal theory” or facts sufficient to support a cognizable legal theory. Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990).

Where a plaintiff sues multiple defendants and sets forth multiple causes of action, he “must allege the basis of his claim against each defendant to satisfy Federal Rule of Civil Procedure 8(a)(2), which requires a short and plain statement of the claim to put defendants on sufficient notice of the allegations against them.” Gauvin v. Trombatore, 682 F.Supp. 1067, 1071 (N.D.Cal. 1988). Even absent other pleading deficiencies, such “confusion of which claims apply to which defendants would require that the complaint be dismissed with leave to file an amended complaint.” Gen-Probe, Inc. v. Amoco Corp., 926 F.Supp. 948, 961 (S.D.Cal. 1996)(citing Gauvin, 682 F.Supp. at 1071.) “Specific identification of the parties to the activities alleged is required...to enable the defendant[s] to plead intelligently.” Van Dyke Ford, Inc. v. Ford Motor Co., 399 F.Supp. 277, 284 (E.D.Wis. 1975).

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II. Analysis

A. *Failure of the Pleadings to Allege Facts Sufficient to Survive a Rule 12(b)(6) Motion to Dismiss*

As a first consideration, as Defendants note, the Complaint relates almost no facts demonstrating any wrongs by particular defendants, but rather ascribes nearly all allegations collectively to “Defendants.” Outside the section identifying the parties, Countrywide is mentioned

1 only as assignee of a “beneficial interest” in the loan and having “approved loans with higher and
 2 higher debt-to-income...ratios” to “expand market share.” (Compl. at ¶¶ 24, 35.) MERS is mentioned
 3 only once, as “the current but unascertained beneficiary of the Deed of Trust.” (Compl. at ¶ 95.)
 4 These averments are insufficient to state a claim on Plaintiff’s behalf. Further, Plaintiff has not
 5 specified which *claims* are brought against which defendants for what conduct. Rather, Plaintiff
 6 simply asserts all defendants are acting in concert and therefore alleges all claims indiscriminately.
 7 This “shotgun” approach does not meet the Rule 8 pleading standard. While this failing alone
 8 warrants dismissal of the Complaint, the motion’s substantive arguments are addressed in the
 9 following sections.

10 *B. RICO and Fraud*

11 Countrywide and MERS argue Plaintiff’s fraud and RICO causes of action must be dismissed
 12 because they have not been pled with particularity with respect to any defendants, as required by Rule
 13 9(b). (Mot. at 7-10.) The court agrees.

14 “Rule 9(b)’s particularity requirement applies to state-law causes of action.” Vess v. Ciba-
 15 Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003). On a claim for fraud, then, a “pleading is
 16 sufficient under rule 9(b) if it identifies the *circumstances* constituting fraud so that a defendant can
 17 prepare an adequate answer from the allegations.” Moore v. Kayport Package Express, Inc., 885 F.2d
 18 531, 540 (9th Cir. 1989)(citations omitted). “While statements of the time, place and nature of the
 19 alleged fraudulent activities are sufficient, mere conclusory allegations of fraud” are not. Id. Further,
 20 Rule 9(b) requires a plaintiff to attribute particular fraudulent statements or acts to individual
 21 defendants. Id. Here, Plaintiff has not identified any particular statements or misrepresentations,
 22 much less linked them to specific defendants.

23 A claim under RICO must also satisfy Rule 9(b)’s particularity requirements. In her RICO
 24 claim, brought under 18 U.S.C. § 1962(c), Plaintiff alleges Defendants were involved in “racketeering
 25 activity” by virtue of their allegedly collusive participation in indictable activities including mail fraud
 26 (18 U.S.C. § 1341), wire fraud (§ 1343), obstruction of justice (§ 1503), obstruction of criminal
 27 investigations (§ 1510), and obstruction of State or local law enforcement (§ 1511). See 18 U.S.C.
 28 § 1961(B). However, Plaintiff’s Complaint is completely void of factual support for these wildly

1 broad, conclusory, and largely irrelevant statements. “To state a claim under 18 U.S.C. § 1962(c), a
 2 plaintiff must allege ‘(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering
 3 activity.’” Odom v. Microsoft Corp., 486 F.3d 541, 547 (9th Cir. 2007)(quoting Sedima, S.P.R.L. v.
 4 Imprex Co., 473 U.S. 479, 496 (1985). Citation of random statutory language does not a viable claim
 5 make. Plaintiff’s allegations do not state a claim for relief and do not meet the Rule 9(b) particularity
 6 standard.

7 Plaintiff’s RICO and fraud causes of action are therefore dismissed without prejudice as to all
 8 defendants.

9 *C. TILA and RESPA*

10 Plaintiff alleges Defendants failed to provide her with the required early Disclosure Statement
 11 under 12 C.F.R. § 226 (“Regulation Z”), and did not properly disclose material loan terms, including
 12 applicable finance charges, interest rate, and total payments as required by 15 U.S.C. § 1632. (Compl.
 13 at ¶¶ 74-75.) Plaintiff seeks rescission of the mortgage loan as well as damages and attorneys’ fees.
 14 (Compl. at ¶ 78, p. 19.).

15 Plaintiff’s request for damages relating to improper disclosures under TILA is subject to a one-
 16 year statute of limitations, typically running from the date of loan execution. See 15 U.S.C. §1640(e)
 17 (any claim under this provision must be made “within one year from the date of the occurrence of the
 18 violation.”). Plaintiff alleges the loan closed on August 7, 2006. (Compl. at ¶ 12.) The instant suit
 19 was not filed until October 9, 2008, well over two years later. (Compl. Summons.)

20 The Ninth Circuit has held equitable tolling of civil damages claims brought under TILA may
 21 be appropriate “in certain circumstances,” such as when a borrower might not have had a reasonable
 22 opportunity to discover the nondisclosures at the time of loan consummation. King v. State of
 23 California, 784 F.2d 910, 915 (9th Cir. 1986). Courts then have discretion to “adjust the limitations
 24 period accordingly.” Id. The applicability of equitable tolling often depends on matters outside the
 25 pleadings. Supermail Cargo, Inc. v. U.S., 68 F.3d 1204, 1206 (9th Cir. 1995) (citing Cervantes v. City
 26 of San Diego, 5 F.3d 1273, 1276 (9th Cir. 1993). Therefore, the determination “is not generally
 27 amenable to resolution on a Rule 12(b)(6) motion.” Id. Here, however, not only has Plaintiff failed
 28 to state relevant facts to support a TILA claim, she has not demonstrated any entitlement to equitable

1 tolling. For these reasons, Plaintiff's claim for damages under TILA is dismissed with prejudice as
2 to all defendants.

3 Defendants argue Plaintiff's request for rescission under TILA, 15 U.S.C. § 1635, fails as a
4 matter of law because, as an assignee, Countrywide could only be liable "if violations of TILA are
5 apparent on the face of the loan documents." 15 U.S.C. § 1641; (Mot. at 12-13.) Plaintiff's purported
6 right to rescission does flow as against any assignee. 15 U.S.C. § 1641(c) ("Any consumer who has
7 the right to rescind a transaction under section 1635...may rescind the transaction as against any
8 assignee of the obligation."). In addition, assessment of the facial sufficiency of the loan documents
9 is a question of fact inappropriate for a Rule 12(b)(6) motion to dismiss, particularly where such
10 documents are not properly before the court. This argument is moot, however, because Plaintiff's
11 claim is fatally flawed. Under 15 U.S.C. § 1635(e), "residential mortgage transactions" are excluded
12 from the three-year right of rescission. A "residential mortgage transaction" is defined by 15 U.S.C.
13 § 1602(w) to include "a mortgage, deed of trust, ... or equivalent consensual security
14 interest...created...against the consumer's dwelling to finance the acquisition...of such dwelling."
15 Thus, while home equity loans and refinancing transactions would be amenable to rescission,
16 Plaintiff's purchase money mortgage is not. Plaintiff's TILA rescission claim is therefore dismissed
17 with prejudice as to all defendants.

18 In her RESPA claim, Plaintiff alleges Defendants violated section 8(a), 12 U.S.C. § 2607(a),
19 by giving and accepting improper fees or kickbacks, by "driving up settlement costs, by failing to
20 disclose business relationships between service providers, by failing to properly follow notice of
21 transfer provisions, [and] by failing to properly inform Plaintiff about all closing costs." (Compl. at
22 ¶ 84.) Although Countrywide and MERS protest the sufficiency of the allegations (Mot. at 13-14),
23 Plaintiff's claim fails for a more basic reason – she faces yet another procedural bar. Plaintiff's
24 RESPA section 8 claim is precluded by the applicable one-year statute of limitations under 12 U.S.C.
25 § 2614 and is hereby dismissed with prejudice as to all defendants.

26 *D. Negligence and Negligent Infliction of Emotional Distress*

27 "Negligent infliction of emotional distress is not an independent tort; it is the tort of negligence
28 to which the traditional elements of duty, breach of duty, causation, and damages apply." Ess v.

1 Eskaton Properties, Inc., 97 Cal.App.4th 120, 126 (2002)(citing Marlene F. v Affiliated Psychiatric
 2 Med. Clinic, Inc., 48 Cal.3d 583, 588 (1989)). For both causes of action, then, a plaintiff must allege
 3 a valid legal duty owed by the defendants. Here, Plaintiff argues Defendants owed her a “duty...of
 4 due care,” and in particular, a “duty to exercise reasonable care and skill in performing their duties”
 5 for *her* benefit. (Compl. at ¶¶ 47, 52.) Generally, barring an assumption of duty or a special
 6 relationship, “financial institutions owe no duty of care to a borrower when the institution’s
 7 involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender
 8 of money.” Nymark v. Heart Fed. Sav. & Loan Ass’n, 231 Cal.App.3d 1089, 1096 (1991). Although
 9 California law imposes a fiduciary duty on a mortgage *broker* for the benefit of the borrower, no such
 10 duty is imposed on a lender. UMET Trust v. Santa Monica Med. Inv. Co., 140 Cal.App.3d 864, 872-
 11 73 (1983); Price v. Wells Fargo Bank, 213 Cal.App.3d 465, 476 (1989)(citing Downey v. Humphreys,
 12 102 Cal.App.2d 323, 332 (1951)) (“‘A debt is not a trust and there is not a fiduciary relation between
 13 debtor and creditor as such.’ The same principle should apply with even greater clarity to the
 14 relationship between a bank and its loan customers.”). Plaintiff characterizes Countrywide as a
 15 “lender and/or loan servicer” and does not allege MERS acted as a mortgage broker. (Compl. at ¶¶
 16 3-4.) In fact, all defendants are collectively referred to as “Mortgage Lenders” throughout the
 17 Complaint. Plaintiff has not alleged any duty for Countrywide or MERS that has been imposed by
 18 law, assumed by the defendants, or created by a special relationship with Plaintiff. Thus, Plaintiff’s
 19 claims for negligence and negligent infliction of emotional distress are dismissed without prejudice
 20 as to Countrywide and MERS only.

21 *E. Quiet Title and Slander of Title*

22 Plaintiff seeks to quiet title in the property as against each defendant, and argues “[t]he
 23 foreclosure of the Subject Property is wrongful and should be voided by virtue of Defendants’
 24 fraudulent conduct...and by reason of the defective Deeds of Trust.” (Compl. at ¶ 91.) In order to
 25 adequately allege a cause of action to quiet title, a plaintiff’s pleadings must include a description of
 26 “[t]he title of the plaintiff as to which a determination...is sought and the basis of the title...” and “[t]he
 27 adverse claims to the title of the plaintiff against which a determination is sought.” Cal. Code Civ.
 28 Proc. § 761.020. A plaintiff is required to name the “specific adverse claims” that form the basis of

1 the property dispute. See Cal. Code Civ. Proc. § 761.020, cmt. at ¶ 3. None of Plaintiff's allegations
 2 show any adverse claims; the recorded Notices do not affect Plaintiff's title, ownership, or possession
 3 in the Property. As discussed herein, Plaintiff has not adequately alleged any fraudulent conduct
 4 which might serve as a basis for the cause of action. Finally, in California, a quiet title pleading must
 5 be verified through a sworn statement; Plaintiff's Complaint is unverified. The cause of action to
 6 quiet title is therefore dismissed without prejudice as to all defendants.

7 In her "slander of title" claim, Plaintiff avers Defendants "wrongfully and without privilege"
 8 caused recordation of the Notice of Default, in violation of Cal. Civ. Code § 2924.² (Compl. at ¶¶ 95-
 9 98.) Slander of title is a "tortious injury to property resulting from unprivileged, false, malicious
 10 publication of disparaging statements regarding the title to property owned by plaintiff, to plaintiff's
 11 damage." Southcott v. Pioneer Title Co., 203 Cal.App.2d 673, 676. A disparaging statement is one
 12 intended to cast doubt the existence or extent of one's interest in the property. Glass v. Gulf Oil
 13 Corp., 12 Cal.App.3d 412, 423. As mentioned above, though, the recorded Notices make no claim
 14 to Plaintiffs' property nor cast any doubt to their ownership.

15 Whether MERS's actions are privileged is unclear. In Kachlon v. Markowitz, 168 Cal.App.4th
 16 316, 333 (2008), the court held that "section 2924 deems the statutorily required mailing, publication,
 17 and and delivery of notices in nonjudicial foreclosure, and the performance of nonjudicial foreclosure
 18 procedures, to be privileged communications under the qualified, common-interest privilege of [Civ.
 19 Code] section 47, subdivision (c)(1)." Thus, if MERS were properly acting as the foreclosure trustee,
 20 or otherwise as an agent of the beneficiary, it could claim the privilege. However, Plaintiff suggests
 21 that MERS cannot because, as a suspended California corporation, "is not qualified to do business in
 22 California." (Compl. at ¶¶ 5.) MERS offers no rebuttal.

23 In the end, regardless of whether MERS's conduct was privileged, the recorded documents do
 24 not qualify as disparaging statements. Thus, Plaintiff's slander of title cause of action is dismissed
 25 with prejudice as to all defendants.

26 *F. Cancellation of Deed of Trust Based on Fraud and Impossibility*

28 ²In fact, Plaintiff asserts unnamed party Recontrust, acting as the agent for MERS, recorded the Notice of Default. (Compl. at ¶ 95.)

1 Plaintiff offers that, because Defendants “fabricated and submitted falsified loan documents”
 2 and because Plaintiff “lacked ability to perform the loan,” the loan contracts and Promissory Notes
 3 are null and void. (Compl. at ¶ 88.) Consequently, Plaintiff asks the court to cancel the Deeds of
 4 Trust. While fraudulent loan documents might provide grounds for loan cancellation, as stated above,
 5 Plaintiff’s Complaint fails to meet the fraud pleading standards of Rule 9(b). Further, Plaintiff’s
 6 inability to perform the obligations to which she agreed, without more, does not provide a basis for
 7 cancellation of the loan. Plaintiff’s claim for cancellation is dismissed without prejudice as to all
 8 defendants.

9 *G. Lis Pendens*

10 While ignoring the pleading requirements for a quiet title request, Plaintiff did comply with
 11 Cal. Civ. Code § 761.010 by recording a *lis pendens* with the county. Defendants ask the court to
 12 expunge the *lis pendens* pursuant to Cal. Civ. Code §§ 405.31 and 405.32. A court “shall order the
 13 notice [of pendency] expunged if...the pleading on which the notice is based does not contain a real
 14 property claim.” Cal. Civ. Code § 405.31. A “real property claim” is defined, *inter alia*, as a cause
 15 of action “which would, if meritorious, affect...title to, or the right to possession of, specific real
 16 property....” Cal. Civ. Code § 405.4. Since Plaintiff has alleged no viable claims, much less a “real
 17 property claim,” the court grants Defendants’ request to expunge the *lis pendens*.

18 *H. Injunctive Relief*

19 Finally, Plaintiff seeks injunctive relief to forestall any foreclosure sale but does not offer any
 20 particular supporting cause of action. A request for injunctive relief by itself does not state a cause
 21 of action and is properly brought before the court as a separate motion. Shamsian v. Atl. Richfield
 22 Co., 107 Cal.App.4th 967, 984-85 (2003). Even if the court were to construe this request as derivative
 23 of all other alleged causes of action, Plaintiff would still bear the burden of showing: (1) a
 24 combination of probable success and the possibility of irreparable harm, or (2) serious questions and
 25 the balance of hardship tips in her favor. Arcamuzi v. Continental Air Lines, Inc., 819 F.2d 935, 937
 26 (9th Cir. 1987). Under either formulation, however, Plaintiff must demonstrate a “fair chance of
 27 success on the merits” and a “significant threat of irreparable injury.” Id. As the discussion above
 28 outlines, Plaintiff has failed to demonstrate a likelihood of success on the merits and is not entitled to

1 injunctive relief based on her pleadings.

2 //


3 **Conclusion**

4 For the reasons set forth above, the motion to dismiss (Doc. No. 5) is **GRANTED**. In
5 particular, Plaintiff's fraud, RICO, cancellation, quiet title, and slander of title causes of action are
6 hereby **DISMISSED** as to all defendants, without prejudice and with leave to amend. Plaintiff's
7 causes of action for TILA and RESPA are hereby **DISMISSED** with prejudice as to all defendants.
8 Plaintiff's causes of action for negligence and negligent infliction of emotional distress are hereby
9 **DISMISSED** without prejudice as to Countrywide and MERS only. Further, the court **ORDERS** the
10 *lis pendens* recorded by Plaintiff expunged from the title record of the Property identified in the
11 Complaint as 688 Rue Avallon, Chula Vista, California, 93913.

12 In light of the disposition of Plaintiff's claims, Plaintiff is granted leave to amend. Plaintiff
13 shall file and serve an amended complaint within 20 days of the filing of this Order.

14 **IT IS SO ORDERED.**

15 DATED: March 9, 2009

16 
17 Hon. Jeffrey T. Miller
United States District Judge